IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES LYLE HOISINGTON, Appellant.	2 CA-CR 2005-0319 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051398

Honorable Charles S. Sabalos, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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E S P I N O S A, Judge.

¶1 Appellant James Hoisington was convicted after a jury trial of second-degree trafficking in stolen property, a class three felony, and theft by controlling stolen property, a class five felony. At trial, Hoisington admitted he had three prior felony convictions, and was sentenced to concurrent, enhanced mitigated prison terms, the longest of which was ten

years. On appeal, Hoisington contends the court erred by not ruling on his motion for substitute counsel, denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., giving a particular jury instruction, and enhancing his sentence. He also contends the prosecutor committed misconduct during closing argument and there was insufficient evidence to support his convictions. We affirm Hoisington's convictions, but remand the case to the trial court for resentencing.

Factual and Procedural Background

¶2 We view the facts and any reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). During a weekend in August 2004, a pump and hoses worth approximately $1,400 were stolen from a construction site in Tucson. On the following Monday, employees of Granite Construction returned to work and discovered the site had been burglarized and the equipment was missing. In December, a patron noticed a Granite Construction identification sticker on a pump for sale in a pawnshop. He contacted a Granite employee, who called police and later, identified the pump as the one stolen in August.[1] Pawnshop records showed Hoisington had pawned the pump for $100 on Sunday, before the burglary had been discovered. Hoisington was indicted for second-degree trafficking in

[1]The hoses were not recovered. The pawnshop employee testified the shop did not accept that type of merchandise.

stolen property and theft by controlling stolen property.[2] He was convicted and sentenced as noted above, and this appeal followed.

Motion for Self-Representation

¶3 Hoisington first argues the court erred by failing to rule on his "request for new counsel." Prior to trial, the Public Defender's office withdrew from representing Hoisington because its previous representation of a witness in the case created a conflict of interest. Contract counsel was appointed and Hoisington eventually sent a letter to the superior court clerk asking if he had the "right to represent himself."[3] At a pretrial hearing, the trial court referred to Hoisington's letter, telling him it was possible for him to represent himself and Hoisington responded: "I think I'd better stick with [counsel]." The court then stated: "I guess if there's a motion on the table regarding your request that you appear on your own behalf[,] it's withdrawn." Hoisington again said: "I'll be happy to have [counsel] represent me." Because Hoisington withdrew his request to represent himself at the hearing, the trial court did not err by not ruling on it. Hoisington's additional claim that the trial court forced him to choose between his current counsel and self-representation is not supported by the record and, thus, we do not address it.

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[2]Hoisington was also indicted on drug charges arising from his arrest, which were eventually dismissed.

[3]Hoisington had previously requested that he either represent himself or be appointed a particular attorney.

Rule 20 Motion

¶4 Hoisington next argues the trial court wrongly denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., and there was insufficient evidence to support his convictions. We review the trial court's ruling on a motion for judgment of acquittal for an abuse of discretion. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458. Every conviction must be based on "substantial evidence," Rule 20(a), Ariz. R. Crim. P., that is, evidence "which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable people could differ about whether the evidence establishes a fact that is in issue, that evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992). We will reverse a conviction for insufficient evidence "only if 'there is a complete absence of probative facts to support [the trial court's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶5 To prove second-degree trafficking in stolen property, the state was required to establish beyond a reasonable doubt that Hoisington "recklessly traffic[ked] in the property of another that ha[d] been stolen." A.R.S. § 13-2307(A). "'Traffic' means to sell, transfer . . . or otherwise dispose of stolen property to another person or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer . . . or otherwise dispose of the property to another person." A.R.S. § 13-2301(B)(3). "Stolen property" is defined as "property that has been the subject of any unlawful taking." § 13-2301(B)(2). To establish

the mental state of recklessness, the state must show Hoisington consciously disregarded a substantial risk that the pump might be stolen. *See* A.R.S. § 13-105(9)(c).

¶6 The state did not refute Hoisington's claim that he had purchased the pump at a yard sale or allege that he had actually stolen the pump from the construction site; instead the state maintained that Hoisington knew or had reason to know the pump was stolen when he pawned it. Factors that may indicate guilty knowledge include 1) "false, evasive or contradictory statements" regarding the defendant's possession of the property; 2) an unusual manner of acquiring the property; 3) the plausibility of defendant's story about acquiring the property; 4) whether defendant hid or attempted to hide the property; and 5) how soon after the theft the defendant acquired the property. *State v. Gaines*, 113 Ariz. 206, 208, 549 P.2d 574, 576 (1976), *overruled in part on other grounds by State v. Avila*, 127 Ariz. 21, 24, 617 P.2d 1137, 1140 (1980).

¶7 At trial, the state's evidence showed that Hoisington had pawned the pump before the theft was even discovered and had identified himself using his driver's license from the state of Washington. He sought only $100 for the pump, although the pawnshop employee testified he had offered Hoisington more money because the employee estimated the pump was worth at least $1,200. A Tucson Police Department detective testified Hoisington had given him a man's first name and a description of a neighborhood, house and vehicle in connection with obtaining the pump, but the detective was unable to locate the person, house, or vehicle. Hoisington testified he had requested and received a receipt from the seller because Hoisington "had been in trouble before," had seen an engraving on the

pump, and thought it was worth four or five times the asking price of $100.[4] Hoisington never showed nor mentioned the receipt to police, but produced a photocopy of it during trial. He also testified he had not told detectives everything he knew about the seller or the transaction. During trial, in response to a jury question, Hoisington stipulated he had never asked the seller about how the pump had been acquired. The jury also heard several conflicting stories about why Hoisington pawned the pump the next day and for such a low amount—that his child had become ill and required a prescription, that he was returning to Washington to take care of some business, and simply that his circumstances had changed from the day before.

¶8 There was substantial evidence supporting the convictions because a reasonable jury could conclude beyond a reasonable doubt that Hoisington recklessly disregarded the risk he might be trafficking in stolen property. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. At the very least, reasonable minds could differ on the inferences to be drawn from the evidence. *See Atwood*, 171 Ariz. at 597, 832 P.2d at 614.

¶9 We conclude that the circumstances, including Hoisington's possession of the pump so close in time to the theft, his own reported suspicions about the pump, which resulted in his obtaining the receipt, his refusal to provide police with all available information regarding the yard sale where he allegedly had purchased it, his willingness to pawn the pump for a small fraction of its actual value, and his contradictory stories about

[4]The prosecutor also questioned Hoisington about finding such a good deal when he arrived at the alleged yard sale after noon.

why he pawned the pump could permit the jury to reasonably infer that Hoisington consciously disregarded the risk that the pump was stolen, and thus committed theft by controlling stolen property and second-degree trafficking in stolen property. *See Gaines*, 113 Ariz. at 208, 549 P.2d at 576. A criminal conviction may be based on circumstantial evidence. *See State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991). Because the evidence here supports the finding that Hoisington met the statutory definition of second-degree trafficking, the trial court did not err in denying his Rule 20 motion on that charge. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477.

¶10 We are not persuaded to conclude otherwise based on the Florida cases Hoisington cites. *State v. Graham*, 238 So.2d 618, 620 (Fla. 1970), and *State v. Bertone*, 870 So.2d 923 (Fla. Dist. Ct. App. 2004), simply require the introduction of evidence that directly supports the jury's inference about a defendant's mental state, *inter alia*, that the defendant acquired the property in an unusual manner or bought and/or sold property at a price significantly below its value. Precisely this type of evidence was introduced here.

Permissible Inference Jury Instruction

¶11 Hoisington contends the trial court erred by instructing the jury on the permissive inferences contained in A.R.S. § 13-2305. We review a trial court's decision to give a particular instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). A trial court may properly give an instruction on any theory that is reasonably supported by the evidence. *See State v. Cruz*, 189 Ariz. 29, 31, 938 P.2d 78, 80 (App. 1996).

¶12 The instructions that Hoisington complains about read:

> Proof of possession of property recently stolen, unless satisfactorily explained, permits an inference that the person in possession of the property was aware of the risk that it had been stolen. However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of property recently stolen.

and

> Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, may give rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen. However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the purchase or sale of property substantially below its fair market value.

"[I]nstructions that create a permissive inference do not ordinarily shift the burden of proof because the state is still required to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven." *State v. Cole*, 153 Ariz. 86, 89, 734 P.2d 1042, 1045 (App. 1987); *see State v. Mohr*, 150 Ariz. 564, 568, 724 P.2d 1233, 1237 (App. 1986).

¶13 Relying on *State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 (1980), Hoisington argues the statutory inferences were inapplicable because he provided explanations for his pawning the pump before it had ever been reported stolen and his willingness to accept only $100 for it. The jury, however, was entitled to weigh Hoisington's credibility and reject his

explanations, as it obviously did, *see State ex rel. McDougall v. Superior Court*, 172 Ariz. 153, 156, 835 P.2d 485, 488 (App. 1992), and *Alfaro* does not hold or suggest otherwise. Moreover, the state was not required to prove Hoisington had taken the pump as long as it presented circumstantial evidence from which the jury could reasonably infer that he knew of the risk the pump was stolen, as permitted by the instructions and applicable law. *See Cole*, 153 Ariz. at 89, 734 P.2d at 1045; *Mohr*, 150 Ariz. at 568, 724 P.2d at 1237. We conclude the trial court did not err in giving the permissive inference instructions based on A.R.S. § 13-2305.

Prosecutorial Misconduct

¶14 Hoisington next argues the prosecutor improperly shifted the burden of proof during closing arguments by commenting on Hoisington's failure to call witnesses he claimed could corroborate his story. The state responds it was entitled to argue reasonable inferences that could be drawn from the evidence, and thus, the prosecutor's argument was proper. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974).

¶15 During closing argument, the prosecutor referred to the receipt Hoisington produced, stating:

> In fact, although the burden is on the state, there hasn't been any testimony from his wife that this happened. There hasn't been

> any testimony from a Jack Smith. . . . It's solely based on the defendant's word. Now, you can consider the defendant's prior felonies, including one for theft, in whether or not he was being truthful with you up on the stand.

¶16 Counsel are given wide latitude in closing argument and may comment on the evidence and argue all reasonable inferences therefrom. *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990). The trial court could find the prosecutor's statement here was a reasonable comment on Hoisington's testimony and credibility. Moreover, it did not permeate the trial, having been made only during closing argument. And, to any extent the comment could have misled the jury, the trial court instructed the jury on the correct burden of proof both at the beginning of the trial and after the close of the evidence. *See State v. Anderson*, 210 Ariz. 327, ¶¶ 49-50, 111 P.3d 369, 383-84 (2005) (instruction that apprised jury of proper standard corrected prosecutor's misstatement). Under these circumstances, we cannot say the prosecutor's comment resulted in any reversible error. *See id.*; *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1991.

Sentence Enhancement

¶17 Hoisington lastly claims the state failed to sustain its burden of establishing that his prior theft convictions in Washington would necessarily have constituted felonies if committed in Arizona and thus, the trial court improperly imposed enhanced sentences based on those prior offenses. The state concedes such evidence was not presented to the trial court and requests that we remand the case for "the limited purpose of clarifying the trial court's findings regarding [Hoisington's] prior out-of-state convictions." However, because there is no evidence in the record that the Washington offenses strictly conformed with the

elements of the Arizona offense, we vacate Hoisington's sentences, *see State v. Heath*, 198 Ariz 83, ¶¶ 4-5, 7 P.3d 92, 93 (2000), and remand the case to the trial court for further proceedings. *See State v. Rodriguez*, 200 Ariz. 105, ¶ 6, 23 P.3d 100, 101 (App. 2001) (double jeopardy clause does not prohibit state producing additional evidence to establish factors in resentencing proceeding). Because we remand for resentencing proceedings, we do not address Hoisington's other arguments about his prior convictions.

Disposition

¶18 Hoisington's convictions are affirmed but his sentences are vacated. We remand the case for resentencing, which may include a determination as to the nature of his prior felony convictions.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge